APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

In the Matter of
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION, No. 40,954.

MEMORANDUM ON OBJECTIONS OF
A. B. GOCHENOUR, *et al.*

JONES, *J.*:

This matter is presented for hearing on the objections of Gochenour and others to the Master's report disallowing compensation to their attorneys and to the Master's recommendation for allowance of compensation to the special counsel appointed by the Court in connection with the suit and settlement of the debtor's* claim against Ball and the Ball Foundation. As the Judge in control of and familiar with the entire proceedings, and responsible for any suggested delay in bringing suit against Ball, I must frankly but justly say that these objectors had nothing whatever to do with the initiation of the Ball suit or the recovery thereon. As the attorneys for a group of bondholder credi-

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* Use of the word "debtor" herein refers to subsidiary debtor, The Cleveland Terminals Building Company.

tors, the applicants asked for the sum of $172,200.00 in connection with services claimed to have been performed in connection with the reorganization and in the objection to the claims of Midamerica and Morgan against the debtor.

It is my opinion that they were adequately compensated for any services performed by them in this reorganization. A generous allowance of $18,000.00 was recommended by the Master, who they seem now to intimate is in some way prejudiced. His recommendation of $18,000.00 was adopted by this Court and affirmed by the Circuit Court of Appeals on May 31, 1943. Any such intimation could, therefore, have no foundation in fact. It is my considered judgment that the Master has fairly appraised this claim to compensation and its disallowance in whole is in accordance with the facts and with my own sense of justice.

The suit against Ball, out of which the recovery of $550,000.00 was had, received its origin and impetus from the decision of this Court in respect of the claim of Midamerica against the debtor, as affirmed by the Circuit Court of Appeals. It was in that action that the legal and equitable status of the Midamerica securities and Ball's interest therein was laid bare and characterized. That decision was the basis of the suit finally commenced against Ball and declared the principles upon which recovery against Ball depended. No lack of diligence or good faith upon the part of this Court's supervising trustees, or its specially appointed counsel, occasioned any delay in bringing the Ball suit, nor did any action or prodding of these applicants hasten the filing of the suit.

This Court was fully advised and aware of the facts upon which recovery might be had, and any seeming delay was the result of the Court's own action in determining the timing of the suit. The charge of bad faith in respect of the Court's appointed officers filing the suit not only is without any foundation, but tends to reflect upon the Court's own action in advising its own appointees that the time

was not yet ripe for filing. Nothing that these objecting applicants did in respect of the Ball suit had any influence or effect upon the Court's instructions to its independently appointed officers. Neither in the so-called Howe suit, nor in other proceedings instituted by these objectors, were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement. The plain fact is that the so-called clarification proceedings filed and prosecuted by these petitioners had a tendency to impair the work then in progress on the Ball suit later brought by the Court's special counsel, and the suit by Gochenour against Ball in Indiana, dismissed by that court, might well have hindered or delayed the success of the Ball suit upon which recovery later was had.

Their institution of the creditor's suit against Ball in Indiana was without any authorization by this Court and contributed nothing but embarrassment and confusion for this Court and its special officers in preparing the proceedings on behalf of the debtor. This statement is supported by the opinion of Judge Baltzell in disposing of that suit. The fact is that the objectors brought the Indiana creditors' suit against Ball in Indiana at a time when the creditors of the debtor were considering the question as to whether this Court should authorize the commencement of an action against Ball on behalf of the debtor.

The same may be said with equal truth in respect of the objectors' efforts to bring in the debtor as a party to the so-called Howe suit filed and voluntarily dismissed in this Court. The inclusion of the debtor as a party defendant in the Howe suit would have created an anomalous and fruitless piece of litigation. Objectors sought to make the debtor a party defendant in the Howe suit in order to pursue Midamerica and certain local officers of that corporation, but such a suit could have led to no fruitful end since Midamerica then had no substantial assets and Ball

and the Ball Foundation were not within the jurisdiction of this Court. Upon what theory the dismissal of the Howe suit could be construed as a grant of authority for these objectors to bring suit against Ball in Indiana is not apparent. It is not consistent with orderly administration of an estate in bankruptcy reorganization to have unauthorized suits and proceedings commenced by creditors or others, where the Court has appointed officers to conduct the affairs of the debtor and to bring such actions as seem to the Court best calculated to preserve and protect the estate.

There seems to be some intimation or suggestion in the briefs of the objectors that special counsel were acting on their own behalf in seeking instructions from the Court and delaying, and then filing the suit as the result of the pressure of the objectors' clarification proceedings. For the instructions, for any asserted delay, and for the timing of the final filing of the actions against Ball, the Court in control of the proceedings takes entire responsibility.

At the oral hearing, it was first stated by the objectors that a certain Exhibit H was not included in the transcript of the record transmitted by the Special Master, and that in Exhibit H was to be found the evidence that the applicants first conceived and were responsible for the facts and theory upon which the recovery later was had against Ball. The matter contained in Exhibit H was information largely obtained from Congressional hearings and, like other facts about the Van Sweringen enterprises and the Midamerica purchases from Morgan & Company, were fairly well advertised and certainly as open to public knowledge as to these objectors. Later, however, applicants preferred to rely upon the filing of the Howe suit, in August of 1939, as their initial conception and disclosure of the facts and theory upon which the Ball suit was made manifest. It will be noted, however, that as early as November 22, 1938, almost a year prior to the filing of the Howe suit, the

Court's supervising trustees, Messrs. Fogg and Leckie, and special counsel Sharp, conferred on their duties as to bringing an action against Midamerica, as trustee, for breach of fiduciary relationship. And all of these matters had been disclosed in the objections to the claims of Midamerica in the Van Sweringen Company (real estate) reorganization before Referee William B. Woods, prior to May 31, 1939.

At the hearing, each of special counsel testified that he never received and never saw Objectors' Exhibit H, nor any papers of like import, before the hearing on these applications before the Special Master. The objectors claimed that they had Exhibit H at the hearing on objections to claims of Midamerica and Morgan, and while attorneys for Morgan & Company and perhaps some other bondholder representatives saw the exhibit, yet the objectors were unable to present any evidence to controvert the statements of the Court's special counsel that none of them ever saw such exhibit before the hearing before the Master on these applications. This evidence clearly refutes objectors' claim here that the Court's special counsel appropriated their conception and material as a basis for their suit against Ball. Nor do I think that there was anything in the Howe suit filed in August, 1939, which contributed in theory or principle in respect of the debtor's claim against Ball which was not already understood by the Court as well as by his special counsel.

I have considered carefully the oral arguments of counsel upon the hearing of the objections, the briefs, the record, and the Master's report, and am satisfied that these objectors are in no position to apply for compensation; that they are not entitled to receive anything, under the facts and the law, and that no claimed ideas or acts of theirs in any conceivable way contributed to the recovery against Ball. My decision of disallowance is not based upon the theory that the objectors were volunteers, and

for that reason not entitled to be compensated, but it is bottomed upon the considered judgment that the objectors contributed nothing to the recovery against Ball, and are not entitled to any allowance out of the settlement of the Ball suit.

Coming now to a consideration of the objections to the recommendation with respect to the application of Messrs. Fogg, Leckie and Sharp, who were appointed special attorneys by the Court to institute and prosecute the suit against Ball *et al.*: these attorneys were appointed on the Court's own responsibility, first, because they had no interest in or connection of any kind with the Van Sweringen enterprises; and, second, because the Court had confidence in their character and ability to conduct such important litigation. All three had had previous experience in the reorganization. Messrs. Leckie and Fogg, as the Court's independent supervising trustees, appointed in February of 1938, and Sharp, as a special counsel to represent the debtor, appointed in July and in August of 1937, where interlocking Van Sweringen interests had made matters complicated, and, as the Court believed, requiring independent representation, as recommended by the Master.

Messrs. Fogg and Leckie were appointed supervising trustees in February, 1938, as the result of a hearing in open court for which notice was given to all interested parties and a large representation was present and the matter fully discussed. No objection to the Court's proposal to appoint them as supervising trustees was voiced at that hearing, and no complaint or objection to their action or services has since come to the ear or notice of the Court. They were appointed supervising trustees and later special counsel in the hope of avoiding conflict and contention and of securing the maximum of disinterested service. It is my opinion that it has proved to have been in the best interests of the estate and its creditors.

The continued efforts throughout the proceedings, and briefs of the objectors, to discredit the efforts of the officers of this Court, and to gain credit for themselves, not only is unfair and unjust, but without the slightest support or justification. On the contrary, the special counsel, after several conferences with the Court, prepared the case against Ball and instituted the suit in Indiana upon the basis of the findings of this Court, as affirmed by the Circuit Court of Appeals, and it was upon those principles that the case was begun and prosecuted to a successful and, as I think, a highly satisfactory settlement under all of the circumstances. There is not the slightest ground for asserting that the suit and settlement were the result of the conception or actions of the objectors.

Although he had performed services directly related to the Ball matter, special counsel Sharp has asked for no compensation in respect of the settlement prior to his appointment on May 1, 1941. Messrs. Leckie and Fogg were appointed supervising trustees in February of 1938 and from November of that year and up to the date of their appointment as special counsel for the purposes of the Ball suit, they had, with the Court's approval, directed much of their time and attention to matters directly concerned with the proposed Ball litigation.

This situation is not like the ordinary bankruptcy where the Judge seldom has knowledge of the legal services performed and must rely upon the Referee's recommendations to a large extent. In this case, the Court has personal knowledge and a full understanding of the nature of the problems involved and the character of service required to be rendered. The nature, extent and value of the legal services required also are fully known and understood. No action of like character brought against a prominent and philanthropic citizen in his own bailiwick is dead certain of success. The charges must be skilfully drawn and the case fully prepared in advance, to insure the full

and careful consideration of the resident court. It is my considered judgment, based upon such knowledge and understanding, that the Ball suit was skilfully prepared and that the results achieved were due to that fact.

I have examined the application of special counsel and it is my independent judgment that the amount recommended by the Master is not in excess of a fair appraisal of the value of those services. It is not quite 12% of the amount of the settlement and is reasonable compensation for the services performed, within the meaning and intention of the Bankruptcy Act.

An order may be entered confirming the Master's recommendations.

(Signed) JONES,

United States District Judge.

November 9, 1943.

APPENDIX B.

Bankruptcy Act, Section 250.

Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.